85-968

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BILL ARMONTROUT,
WARDEN, MISSOURI STATE PENITENTIARY,
Petitioner,

vs.

BRIAN KEITH MOORE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a finding by state trial or appellate courts that a particular construction of a state criminal law was not unexpected or unforeseeable under the decisional and statutory law existing at the time of the alleged criminal conduct is a determination of historical fact and thus entitled to a presumption of correctness under 28 U.S.C. §2254(d).

2. Whether, even assuming that the above determination is a mixed issue of law and fact, it is a question of the construction of state law by a state appellate court which is binding upon the federal courts.

3. Whether the United States Court of Appeals for the Eighth Circuit misapplied the decisional law of this Court in holding that the application of Missouri's felony-murder rule to respondent was an "unexpected" and "unforeseeable" expansion of Missouri law.

INDEX

Questions Presented I
Table of Authorities III
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions 2
Statement of the Case 3
Argument 7
Conclusion 16
Appendix A A-1
Appendix B A-17
Appendix C A-19
Appendix D A-23

TABLE OF AUTHORITIES

Cases Cited

Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 7, 11, 12
Engle v. *Isaac*, 456 U.S. 107 (1982) 10
Greene v. *Massey*, 706 F.2d 548 (5th Cir. 1983), *cert. denied* 104 S.Ct. 718 (1984) 10
Knutson v. *Brewer*, 619 F.2d 747 (8th Cir. 1980) 14, 15
Marks v. *United States*, 430 U.S. 188 (1977) 7
Marshall v. *Lonberger*, 459 U.S. (1983) 9
Moore v. *State*, 651 S.W.2d 578 (Mo.App. 1983) 4, 5, 8, 11
Moore v. *Wyrick*, 510 F.Supp. 1214 (E.D.Mo. 1981) 4
Moore v. *Wyrick*, 668 F.2d 1007 (8th Cir. 1982) 4
Patton v. *Yount*, ___ U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) 9, 10
People v. *Hickman*, 59 Ill.2d 89, 319 N.E.2d 511 (1974), *cert. denied* 421 U.S. 913 (1975) 12
People v. *Johnson*, 28 Cal.App.3d 653, 104 Cal.Rptr. 808 (1975) 15
People v. *Stamp*, 2 Cal.App.3d 203, 82 Cal.Rptr. 598 (1969) 15
Rose v. *Locke*, 423 U.S. 48 (1975) 14
Rushen v. *Spain*, ___ U.S. ___, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) 9
State v. *Adams*, 339 Mo. 926, 98 S.W.2d 632 (1936) 13
State v. *Glenn*, 429 S.W.2d 235 (Mo. banc 1968) 13
State v. *Glover*, 330 Mo. 709, 50 S.W.2d 1049 (1932) 5, 13
State v. *Hogan*, 565 S.W.2d 848 (Mo.App. 1978) 3
State v. *Majors*, 237 S.W.2d 486 (Mo. 1922) 12
State v. *Messino*, 325 Mo. 743, 30 S.W.2d 750 (1930) 13
State v. *Moore*, 580 S.W.2d 747 (Mo. banc 1979) 3, 8, 11, 12, 13, 14
State v. *Mullen*, 532 S.W.2d 794 (Mo.App. 1975) 13

State v. *Olds*, 603 S.W.2d 501 (Mo. banc 1980) 4
State v. *Shuler*, 486 S.W.2d 505 (Mo. 1972) 15
State v. *Thompson*, 280 N.C. 202, 185 S.W.2d 666 (1972) ... 15
State v. *Williams*, 254 So.2d 548 (Fla.App. 1971) 12
United States ex. rel. Almeida v. *Rundle*, 383 F.2d 421 (3rd Cir. 1967), *cert. denied* 393 U.S. 863 (168) 14, 15
United States ex rel. Rock v. *Pinkey*, 430 F.Supp. 176 (N.D. Ill. 1977), *aff'd.* 582 F.2d 1282 (7th Cir. 1978) 14, 15
Wainwright v. *Goode*, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) 9, 10
Wainwright v. *Witt*, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) 9, 10

Statutes Cited

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(c) 2
28 U.S.C. § 2241 5
28 U.S.C. § 2254(d) 2, 8
§ 559.010, RSMo 1969 ..... 2, 4
Missouri Supreme Court Rule 27.26 4

Constitutional Provisions Cited

United States Constitution, Fourteenth Amendment 2

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, dismissing respondent's petition for a writ of habeas corpus, is unreported and appears as Appendix B to the present petition. The Magistrate's Review and Recommendation, adopted by the District Court as part of its order of dismissal, is attached to this petition as Appendix C. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the District Court and granting respondent's petition for a writ of habeas corpus, is unreported and is reproduced herein as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the

District Court below and granting respondent's petition for a writ of habeas corpus under 28 U.S.C. §2254, was rendered on July 10, 1985. Thereafter, on September 9, 1985, petitioner's petition for a rehearing *en banc* was denied by the Court of Appeals, with four judges dissenting; a copy of the order denying rehearing is attached hereto as Appendix D. Pursuant to 28 U.S.C. §2101(c), the present petition for a writ of certiorari has been filed within ninety days of the entry of judgment by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor any to any person within its jurisdiction the equal protection of the laws."

2. 28 U.S.C. §2254 reads in pertinent part as follows:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

3. Section 559.010, RSM0 1969 (repealed 1975), provides as follows:

> "Every murder which shall be committed by means of poison, or lying in wait, or by any other kind of willful,

deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree."

STATEMENT OF THE CASE

The respondent, Brian Keith Moore, was convicted in 1976 of first degree felony-murder and attempted first degree robbery, for which crimes he received consecutive sentences of life imprisonment and five years imprisonment, respectively. The state's evidence at trial indicated that respondent and two accomplices entered a tavern called the Emergency Room Lounge, located in the City of St. Louis, and produced various weapons and announced a holdup; that a customer in the bar, one Albert Williams, drew a pistol and exchanged shots with the would-be robbers; that Williams, respondent and one of respondent's accomplices (Ross Hogan) were all wounded in this shootout; and that after the attempted robbers had fled it was discovered that another tavern patron, Lawrence Meadows, had been killed during the exchange of shots by a bullet from Williams' gun. See *State* v. *Moore*, 580 S.W.2d 747, 748-749 (Mo. banc 1979); and *State* v. *Hogan*, 565 S.W.2d 848, 849 (Mo.App. 1978), for a more extensive summary of the facts. Respondent's guilt of felony-murder was premised upon the principle that, although the victim was not killed by a bullet fired by respondent or his accomplices, the death was proximately caused by their attempt to rob the tavern and engaging in a shootout in the establishment for that purpose.

Respondent's appeal from his convictions was first filed in the Missourt Court of Appeals, St. Louis District, but was thereafter transferred after opinion to the Supreme Court of Missouri for consideration of whether the felony-murder rule applied when the killing was proximately caused but not directly perpetrated by the felons. *State* v. *Moore*, *supra* at

748. The Missouri Supreme Court held that this "proximate cause" construction of felony-murder was consistent with Missouri's first degree murder statute, §559.010, RSMo 1969 (repealed 1975), and was supported by prior decisional law from Missouri and other states. *Id.* at 751-753. Concluding that the death of Lawrence Meadows was the direct and foreseeable result of the robbery and shootout committed by respondent and his accomplices, the Supreme Court affirmed respondent's convictions and sentences. *Id.* at 752-753.

Following the affirmance of his conviction, respondent filed a post-conviction collateral attack under Missouri Supreme Court Rule 27.26. As subsequently amended, respondent's Rule 27.26 motion alleged for the first time that he had had no "fair notice" that the felony-murder statute was applicable, on a "proximate cause" basis, to the fact of his case.[1] This contention was rejected by the Circuit Court of the City of St. Louis, the Honorable Ivan Lee Holt, Jr.; however, the Circuit Court vacated respondent's conviction and five-year sentence for attempted first degree robbery on the ground that, under recent Missouri Supreme Court decisions, conviction of both felony-murder and the underlying felony constituted double jeopardy. *State* v. *Olds*, 603 S.W.2d 501, 509-510 (Mo. banc 1980). On appeal from the denial of his post-conviction motion, the Missouri Court of Appeals, Eastern District, extensively addressed respondent's alleged denial of "fair notice." *Moore* v. *State*, 651 S.W.2d 578 (Mo.App. 1983). Reviewing the pertinent decisional authorities in Mis-

[1]Contemporaneous with his state post-conviction motion, respondent filed a federal habeas corpus petition in which he also advanced his "fair notice" theory. This petition was dismissed for failure to exhaust state remedies, *Moore* v. *Wyrick*, 510 F.Supp. 1214 (E.D.Mo. 1981), but the Eighth Circuit reversed and remanded, expressing uncertainty on the exhaustion issue. *Moore* v. *Wyrick*, 668 F.2d 1007 (8th Cir. 1982). On remand, a United States Magistrate again recommended the dismissal of the petition on exhaustion grounds, whereupon respondent voluntarily dismissed the petition.

souri and from other jurisdictions (*Id.* at 580-581), the Court of Appeals ruled as follows:

> "In light of the test which the Missouri Supreme Court adopted in [*State* v. *Glover*, 330 Mo. 709, 50 S.W.2d 1049] in 1932, we think that since the victim's death was the natural and proximate result of defendant's actions, movant was put on notice that his conduct would be considered first degree murder. Consequently, the construction put on §559.010 by the Missouri Supreme Court could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution." *Moore* v. *State*, *supra* at 581.

On the basis of this finding, the denial of respondent's Rule 27.26 motion was affirmed. *Id.*

On December 1, 1983, respondent filed the current petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The basis for jurisdiction in that court was that respondent's conviction arose from the Circuit Court of the City of St. Louis, which lies within the Eastern District. 28 U.S.C. §2241(d). On March 30, 1984, United States Magistrate William S. Bahn issued a Magistrate's Review and Recommendation holding that the petition at bar should be dismissed (Petitioner's Appendix C, attached). On May 24, 1984, the District Court, the Honorable William L. Hungate, adopted the recommendation of the magistrate and dismissed respondent's petition (Petitioner's Appendix B, attached). Thereafter, on July 10, 1985, the United States Court of Appeals for the Eighth Circuit, in a divided decision, reversed the ruling of the District Court and directed that respondent's habeas corpus petition be granted with regard to his conviction of first degree felony-murder

(Petitioner's Appendix A, attached).[2] Petitioner's request for a rehearing of this cause by the Court of Appeals *en banc* was denied on September 9, 1985, with four judges dissenting (Petitioner's Appendix D, attached). Petitioner respectfully seeks review by this Court of the decision of the Eighth Circuit and the statutory and constitutional issues presented therein.

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[2]In the majority opinion of the Eighth Circuit, it is asserted that, under its ruling, "Moore's release is dependent upon the completion of his sentence on the underlying first degree attempted robbery conviction that was affirmed by the Missouri Supreme Court. . . ." Appendix A at A-11. This statement is both inaccurate and peculiar, since the Eighth Circuit was expressly informed that the attempted robbery conviction had been vacated by the state Circuit Court, and the order to this effect was made a part of the federal habeas corpus record.

ARGUMENT

The present appeal involves the constitutional doctrine, grounded in the due process clause of the Fourteenth Amendment, that state courts may not decisionally expand the coverage of a criminal statute and then retroactively apply that expansion to conduct which would otherwise not have been criminal. As expressed in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964),

> "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. . . ."
>
> * * * *
>
> 'When [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime" (citation omitted). *Id.* at 354-355.

See also *Marks* v. *United States*, 430 U.S. 188, 192 (1977).

As set out in petitioner's Statement of the Case, *supra*, the respondent and two accomplices attempted to rob a tavern at gunpoint, which led to a shootout with a customer of the tavern and brought about the death of another patron, although the fatal shot was not fired by respondent or his accomplices. Respondent was convicted of first degree felony-murder on the theory that his actions had proximately brought about the victim's death. For a discussion of the "proximate cause" and "agency" theories of felony-murder, see Annot., 56 A.L.R.3d 239 (1974). On respondent's direct appeal, the Supreme Court of Missouri ruled that the "proximate cause" theory was indeed the law in this state, relying upon decisional authorities from Missouri and other jurisdic-

tions. *State* v. *Moore*, 580 S.W.2d 747, 751-753 (Mo. banc 1979). On appeal from respondent's post-conviction collateral attack, in which he claimed for the first time that the application of the felony-murder rule to him was an unforeseeable expansion of that law, the Missouri Court of Appeals relied upon the same decisions previously cited by the Missouri Supreme Court and expressly found that respondent's conviction of felony-murder was foreseeable. *Moore* v. *State*, 651 S.W.2d 578, 580-581 (Mo.App., 1983). The same conclusion was reached by the United States District Court for the Eastern District of Missouri (Petitioner's Appendices B and C).

The Eighth Circuit, however, saw fit to review this issue *de novo* and arrived at the opposite conclusion (Petitioner's Appendix A). The petitioner respectfully urges that a writ of certiorari is warranted in this case because (1) the decision of the Eighth Circuit refuses to acknowledge that whether the application of the felony-murder statute was foreseeable is an issue of fact and that the state court's findings were entitled to a presumption of correctness under 28 U.S.C. §2254(d); (2) even were §2254(d) not applicable, the Eighth Circuit disregarded a state court interpretation of state law, contrary to the decisions of this Court; and (3) the holding of the Eighth Circuit that respondent's conviction of felony-murder was not foreseeable is a clear misapplication of the decisional law on that issue by this Court.

I. Presumption of Correctness

In placing itself above the Missouri courts on a question of Missouri legal history, the majority opinion of the Eighth Circuit avoided the deference afforded to state court factual findings under §2254(d) by asserting that "[a] finding that a change in the law was foreseeable, while perhaps involving a development of certain underlying historical facts, is at bottom an adjudication of Moore's federal due process rights determined by the application of federal constitutional principles." Appendix A at A-3 - A-4.

Had this narrow construction of §2254(d) been offered five years ago, it might have been arguable. Since that time, however, this Court has repeatedly addressed the kinds of state-court determinations to which §2254(d) is applicable. When a state trial court rules in a capital case that a veniremán's opinions regarding the death penalty "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," this is a determination of *fact* entitled to a presumption of correctness, even though the standard by which the facts are reviewed is a legal one. *Wainwright* v. *Witt*, ___ U.S. ___, 105 S.Ct. 844, 852-855, 83 L.Ed.2d 841 (1985). The same is true of other issues of juror bias or misconduct. *Patton* v. *Yount*, ___ U.S. ___, 104 S.Ct. 2885, 2891-2893, 81 L.Ed.2d 847 (1984); *Rushen* v. *Spain*, ___ U.S. ___, 104 S.Ct. 453, 456-457, 78 L.Ed.2d 267 (1983). Whether a defendant is mentally competent to stand trial is a question of *fact* under §2254(d) even though the test for determining competency is a legal formula which varies from jurisdiction to jurisdiction. *Maggio* v. *Fulford*, 462 U.S. 111, 113-118, (1983). So is a finding that a sentencing judge did not rely upon an impermissible factor in imposing a sentence of death, *Wainwright* v. *Goode*, ___ U.S. ___, 104 S.Ct. 378, 382-383, 78 L.Ed.2d 187 (1983), and a ruling that the evidence supports the voluntariness of a guilty plea, *Marshall* v. *Lonberger*, 459 U.S. 422, 431-435 (1983).

Under the above authorities, how can it possibly be said that a determination of whether respondent's conviction of felony-murder was "unforeseeable" is anything other than an issue of fact for purposes of §2254(d)? Indeed, this question is literally one of "historical fact," as discussed in *Wainwright* v. *Goode*, *supra:* it is nothing other than a tracing of the historical development of Missouri law for the purpose of evaluating respondent's state of mind at the time of the crime—or, more accurately, a fictitious "state of mind" which assumes that respondent was a lawyer and was acquainted with the statutes and decisional authorities pertaining to the

felony-murder doctrine. It is unsupportable for the majority opinion of the Eighth Circuit to suggest that whether a particular prosecution is "foreseeable" is any less a factual determination than whether a venireman is "biased" or whether a defendant is "competent." *Wainwright* v. *Witt, supra; Maggio* v. *Fulford, supra.* Certainly, the factual issue at bar is less likely to require the physical presence of witnesses and the resultant determinations of credibility, although it is conceivable that expert witnesses might be offered in some instances. *Cf. Wainwright* v. *Witt, supra; Patton* v. *Yount, supra.* However, this does not make the issue any less factual, and the above decisions refute any suggestion that credibility determinations are a necessary prerequisite to the applicability of §2254(d). See *Wainwright* v. *Goode, supra,* 104 S.Ct. at 380-381.

"It will not always be easy to separate questions of 'fact' from 'mixed questions of law and fact' for §2254(d) purposes." *Wainwright* v. *Witt, supra,* 105 S.Ct. at 855. This is demonstrated by the fact that this Court has reversed at least seven decisions on this ground in the past four years, and certiorari has been granted on still others. See *Cabana* v. *Bullock,* No. 84-1236, *cert. granted* 53 U.S.L.W. 3757 (April 15, 1985). The present decision, however, is clearly contrary to the above-cited authorities and, petitioner submits, it is worthy of review by this Court.

II. State Construction of State Law

Even were it assumed, contrary to the above principles and authorities, that the determination as to whether respondent's conviction of felony-murder was foreseeable is a mixed question of law and fact, it is impossible to refrain from comment upon the complete absence of any explanation by the Eighth Circuit as to why it is not bound by the state appellate court's interpretation of state law. *Wainwright* v. *Goode, supra,* 104 S.Ct. at 382. As the dissent observes (Appendix A at A-13), the majority's reading of Missouri cases is inconsistent with that of the Missouri Supreme Court on

appellant's direct appeal. *State* v. *Moore*, *supra* at 751-752. That reading is, of course, directly contrary to the holding of the Missouri Court of Appeals on the same issue. *Moore* v. *State*, *supra* at 580-581. The petitioner submits that the Eighth Circuit was without authority to contravene either of these courts in construing the law of this state. *Wainwright* v. *Goode*, *supra*; see *Greene* v. *Massey*, 706 F.2d 548, 553 (5th Cir. 1983), *cert. denied* 104 S.Ct. 718 (1984).

As recently observed in *Engle* v. *Isaac*, 456 U.S. 107 (1982),

> "the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *Id.* at 128.

The present decision raises this intrusion to new heights. For the Eighth Circuit to hold itself as superior to the Supreme Court of Missouri and the Missouri Court of Appeals in its understanding of Missouri law is both unprecendented and unsupportable—if there is a more egregious abuse of that court's authority, petitioner cannot conceive of it. For the above reasons, petitioner submits, a writ of certiorari is warranted in this cause.

III. Misapplication of *Bouie v. City of Columbia*

Assuming, contrary to the above authorities, that the status of Missouri law relating to felony-murder was subject to *de novo* review by the federal courts, it cannot legitimately be argued that application of the felony-murder principle to respondent's conduct was "unexpected," "unforeseeable" or "indefensible by reference to [prior law]." *Bouie* v. *City of*

Columbia, supra at 354.[3] This fact is established by examination of the statute at issue, existing Missouri case law, and authorities from other states prior to the killing at bar. The felony-murder statute under which respondent was convicted states in pertinent part as follows:

> "every homicide which shall be committed *in the perpetration of or attempt to perpetrate* any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree" (emphasis supplied). Section 559.010, RSMo 1969 (repealed 1975).

As is manifest from the above-emphasized language, this statute does not on its face require that the killing be personally accomplished by those persons committing the underlying felony, but only that it be committed in the perpetration or attempted perpetration of that felony. Similar statutory language in other states has been interpreted as applying to cases such as that at bar where the actual fatal act was not committed by the felons. See, e.g., *People* v. *Hickman*, 59 Ill.2d 89, 319 N.E.2d 511, 513-514 (1974), *cert. denied* 421 U.S. 913 (1975), interpreting Ill.Rev.Stat. 1971, Ch 38, § 9-1)(a)(3); and *State* v. *Williams*, 254 So.2d 548, 549-551 (Fla.App. 1971), interpreting F.S.A. §782.04. Accordingly, §559.010 does not in any sense support respondent's claim that Missouri law prior to *State* v. *Moore, supra*, required as a necessary element of felony-murder that the killing be personally committed by those perpetrating the felony. *Cf. Bouie* v. *City of Columbia, supra* at 352.

Nor can the conclusion of the Eighth Circuit be reached by review of the case law in Missouri. The only authority which significantly supports its position is a 1922 decision of the Missouri Supreme Court, *State* v. *Majors*, 237 S.W.2d 486

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[3] In addressing the present issue, petitioner would also refer this Court to the excellent discussion on this subject in the dissenting opinion of Judge John Gibson (Appendix A at A-12 - A-15).

(Mo. 1922); in *Majors*, which presents facts similar to those in respondent's case, the court cited an instruction which told the jury that they could not find the accused guilty of felony-murder if the fatal shot was not fired by him or someone acting in concert with him, and stated, without explanation or citation of authority, that this was a correct statement of the law. *Id.* at 488. A similar implication was made, again without explanation or citation of authority, in the decision of *State* v. *Glenn*, 429 S.W.2d 235, 236-237 (Mo. banc 1968). Also following the *Majors* decision, however, the Missouri courts repeatedly discussed the felony-murder rule in terms which called such holdings into serious question. In *State* v. *Glover*, 330 Mo. 709, 50 S.W.2d 1049 (1932), for example, the Missouri Supreme Court delimited the bounds of felony-murder as follows:

> "[E]ven though the homicide be unintentional yet, if it be committed in the course of perpetrating the felony, and is *a natural and proximate result thereof, such as the defendant reasonably was bound to anticipate—and therefore especially where the felony is dangerous and betokens a reckless disregard of human life*—the homicide will be first degree murder under the statute" (emphasis supplied). *Id.*, 50 S.W.2d at 1053.

Similarly, a number of Missouri decisions have held that "when the homicide is within the *res gestae* of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime in the statutory sense." *State* v. *Adams*, 339 Mo. 926, 98 S.W.2d 632, 637 (1936); see also *State* v. *Messino*, 325 Mo. 743, 30 S.W.2d 750, 759 (1930); *State* v. *Mullen*, 532 S.W.2d 794, 797 (Mo.App. 1975). These authorities were noted by the Missouri Supreme Court in its decision in this case. *State* v. *Moore*, *supra* at 751-752. The attempt by the Eighth Circuit to distinguish *Glover* and *Adams* on their facts (Appendix A at A-9) is of no benefit to the court's position. The issue presented is not whether the "proximate

cause" theory of felony-murder under which respondent was convicted was established as Missouri law at the time of his crime; rather, it is whether the opposite "agency" theory (under which respondent could not be convicted of felony-murder) was so firmly established that a contrary construction would constitute an "unexpected" expansion of the scope of the law. Under the above cases, the very most that could be said is that Missouri decisional law was unsettled on this question.

Finally, in addition to the statutory and decisional law in Missouri which supports the conclusions of the Missouri courts on this issue, there exists ample authority from other states to the same effect. See *State* v. *Moore*, *supra* at 752; Annot., 56 A.L.R.3rd 239, 252-256 (1974). As the Eighth Circuit itself pointed out in *Knutson* v. *Brewer*, 619 F.2d 747 (8th Cir. 1980),

> "The [United States] Supreme Court has specifically held that a state criminal statute may be validly applied to conduct never previously expressly held to be within its terms, when cases in another state, decided before the conduct charged, support such a construction" (citation omitted). Id. at 751.

See Rose v. *Locke*, 423 U.S. 48, 52-53 (1975).

Identical facts to those herein were presented in *United States ex. rel. Almeida* v. *Rundle*, 383 F.2d 421 (3rd Cir. 1967), *cert. denied* 393 U.S. 863 (1968); and *United States ex rel. Rock* v. *Pinkey*, 430 F.Supp. 176 (N.D. Ill. 1977), *aff'd.* 582 F.2d 1282 (7th Cir. 1978). In both cases, defendants convicted of felony-murder on the basis of evidence that persons had died in the course of the felony but had not been killed by the felons themselves complained that this application was an unforeseeable judicial expansion of the felony-murder doctrine. Both courts properly pointed out that the state court's ruling was "not so shockingly in contravention of preexisting notions and policies in the law as to call into play the

protective force of the Fourteenth Amendment" (citations omitted). *United States ex rel. Almeida* v. *Rundle*, *supra* at 427; *see also United States rel. Rock* v. *Pinkey*, *supra* at 181. For other cases presenting analogous facts, *see Rose* v. *Locke*, *supra* at 48-53: and *Knutson* v. *Brewer*, *supra* at 751.

It is well-recognized that " 'the purpose of the felony-murder rule is to deter persons from killing negligently or accidentally by holding them strictly responsible for *all* killings they commit during the perpetration, or attempted perpetration, of any of the enumerated felonies.' " (emphasis in original; citations omitted). *People* v. *Johnson*, 28 Cal.App.3d 653, 104 Cal.Rptr. 808, 810-811 (1975). It is clear that, had Lawrence Meadows been killed by a gun accidentally discharged by one of the robbers, or had he suffered a fatal heart attack as a direct result of the robbery, respondent could have been found guilty of felony-murder under the case law prior to the commission of his crime. *State* v. *Shuler*, 486 S.W.2d 505, 509 (Mo. 1972) (defendant "shot to miss"); *State* v. *Thompson*, 280 N.C. 202, 185 S.W.2d 666, 674 (1972) (accidental discharge of gun); *People* v. *Stamp*, 2 Cal.App.3d 203, 82 Cal.Rptr. 598, 601-603 (1969) (robbery victim died of heart attack). Under these and all of the above-cited authorities, it cannot reasonably be contended that holding respondent responsible for the consequences of his own gunplay was so "unforeseeable" and "unexpected" an application of the felony-murder rule as to constitute a violation of his due process rights.

CONCLUSION

In view of the foregoing, the petitioner respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1926

Brian Keith Moore, *Appellant,* v. Donald W. Wyrick, Warden, and John Ashcroft, Attorney General of the State of Missouri, *Appellees.*	)	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 14, 1985
Filed: July 10, 1985

Before LAY, Chief Judge, and John R. GIBSON and FAGG, Circuit Judges.

FAGG, Circuit Judge,

Brian Moore appeals the dismissal of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Moore contends that he was deprived of rights guaranteed by the due process clause of the fourteenth amendment when the Missouri Supreme Court retroactively applied a new and expansive construction of the Missouri felony murder statute to affirm his conviction. We agree and reverse the dismissal of Moore's petition.

Moore stands convicted of first degree felony murder. The events giving rise to this conviction occurred on July 28, 1975, when Moore and several cohorts attempted to rob a tavern located in St. Louis, Missouri. During the attempt, Albert Williams, one of the tavern's patrons, pulled a gun and exchanged several shots with Moore and his accomplices.

In the exchange of gunfire, another patron was fatally wounded. Ballistic tests later showed that the fatal shots were fired not by Moore or one of his accomplices, but rather were fired by Williams. Despite this fact, Moore was charged with and convicted of first degree felony murder. This conviction was affirmed by the Missouri Supreme Court. *State* v. *Moore*, 580 S.W.2d 747 (Mo. 1979) (en banc) (*Moore I*).

Moore contends that in affirming his conviction the Missouri Supreme Court unforeseeably expanded the scope of Missouri's felony murder statute to encompass a particular factual situation previously determined by that court to be beyond the reach of the statute. *Compare State* v. *Moore*, 580 S.W.2d 747 (Mo. 1979) (en banc) (construing state's felony murder statute to encompass killing by an uninvolved bystander), *with State* v. *Majors*, 237 S.W. 486 (Mo. 1922) (limiting state's felony murder statute to situations in which defendant or an accomplice commits the killing). Moore asserts that this newly expanded judicial interpretation of the state's felony murder statute cannot, consistent with the due process clause of the fourteenth amendment, be applied retroactively to his case, but rather may only be applied prospectively.

To support this position, Moore relies primarily on the Supreme Court case of *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, petitioners asserted that the retroactive application of an expanded judicial interpretation of South Carolina's criminal trespass statute "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." Id. at 350. The Supreme Court agreed with petitioners' position and held that "[w]hen a[n] * * * unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." Id. at

354-55. Further, the Court held that this prohibition applies not only when judicial construction of a statute makes an action "which was innocent when done, criminal," but also when as here judicial construction "aggravates a crime, or makes it greater than it was, when committed." *Id.* at 353 (emphasis omitted) (quoting *Calder* v. *Bull*, 3 Dall. 386, 390 (1978)).

In light of the Supreme Court's decision in *Bouie*, the issue before this court is whether the Missouri Supreme Court's action in affirming Moore's conviction constituted an "unforeseeable" expansion of the Missouri felony murder statute. If with reference to prior Missouri decisions the expansion was unforeseeable, then the decision may not be applied retroactively to Moore because to do so would deprive Moore of the "fair warning" to which he is entitled under the due process clause of the fourteenth amendment. Id. at 354-55. *See also Marks* v. *United States*, 430 U.S. 188, 192 (1977); *Hamling* v. *United States*, 418 U.S. 87, 116 (1974); and *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973) (each describing the test in terms of "unforeseeability" and "fair notice" or "fair warning").

As an initial matter, we note that this same issue was presented to and determined by the Missouri Court of Appeals in Moore's state post-conviction relief proceedings. *Moore* v. *State*, 651 S.W.2d 578 (Mo.App. 1983). The court of appeals rejected Moore's position and held that the Missouri Supreme Court's construction of the state's felony murder statute was foreseeable and could "be given retroactive application to [Moore] without violating the due process clause of the United States Constitution." *Id.* at 581.

The state now contends that the Missouri Court of Appeals' determination with respect to foreseeability constitutes a finding of historical fact and as a result is binding upon this court. We disagree. A finding that a change in the law was foreseeable, while perhaps involving a development of certain underlying historical facts, is at bottom an adjudica-

tion of Moore's federal due process rights determined by the application of federal constitutional principles. While this court must defer to a state court's factual findings if those findings are "fairly supported" in the record, 28 U.S.C. § 2254(d)(8); *See Also Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983) and *Johnson* v. *Nix*, No. 84-1698, slip op. at 2 (8th Cir. June 3, 1985), this court is not bound by a state court's application of federal constitutional principles to those facts, *Sumner* v. *Mata*, 449 U.S. 539, 543-44 (1981). As such, the issue of whether the judicial expansion of a criminal statute was or was not foreseeable and consequently can or cannot be applied retroactively is a question of federal law subject to this court's independent determination. *Cf. Weaver* v. *Graham*, 450 U.S. 24, 33 (1981) (ex post facto law claim is one of federal law).

We turn now to the merits of Moore's appeal. At the time of Moore's involvement in the attempted robbery giving rise to the present action, the Missouri felony murder statute provided that "every homicide which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed murder in the first degree." Mo. Rev. Stat. § 559.010 (1969) (repealed September 28, 1975). As Moore points out, the Missouri Supreme Court, in construing this statute, could have adopted either of two mutually exclusive theories of criminal liability: the agency theory of felony murder or the proximate cause theory of felony murder.

Under the agency theory of felony murder, two basic elements must be established by the state in order to convict the defendant. First, the state must prove that the *defendant* or an *accomplice* actually killed the victim. If the state is unable to establish this threshold element, then the defendant cannot be guilty of felony murder and the state's felony murder statute will not be applicable. Second, if, however, the state is able to show that the defendant or an accomplice was the actual killer, the state must then prove that the killing

was sufficiently related to the felony to be considered as having been committed in the perpetration of the felony. To establish this second element, the state is required to prove that the killing was the natural and proximate result of the felony. If these two primary elements are established, the law attaches the specific intent to commit the related felony to the homicide and will conclusively presume an intent to kill even though the murder itself may not have been specfically intended.

The proximate cause theory of felony murder, on the other hand, differs from the agency theory in one crucial respect. Under the proximate cause theory, unlike the agency theory, the actual identity of the killer is irrelevant in determining the general applicability of the state's felony murder statute. Instead, a determination of whether the death occurred as the natural and proximate result of the felony is dispositive both with respect to the issue of the defendant's personal responsibility and with respect to the issue of whether the killing can be considered to have occurred during the perpetration of the felony. As with the agency theory, intent will be conclusively presumed once it is shown that the felony and the homicide are proximately related.

The key difference between these two theories then is one of identification. Very simply, under the agency theory either the defendant or an accomplice must commit the killing in order for the state's felony murder statute to be applicable. Under the proximate cause theory, however, responsibility can attach regardless of whether the victim was killed by the defendant, an accomplice, another victim, or a bystander, so long as the death is proximately related to the commission of the felony.

On direct appeal to the Missouri Court of Appeals following his conviction, Moore asserted (as he has throughout) that at the time of his crime Missouri followed the agency theory of felony murder. Thus, because neither he nor an

accomplice committed the killing, the state's felony murder statute was inapplicable, and as a result could not be used as a basis to convict him of first degree felony murder.

To support this position, Moore relied primarily on the factually indistinguishable Missouri Supreme Court case of *State* v. *Majors*, 237 S.W. 486 (Mo. 1922). In *Majors*, the defendant (Majors) and several confederates attempted to rob a late night poker game. As in the present case, one of the individuals attending the game (Wade) drew a gun and in the ensuing exchange another person attending the card game was fatally wounded. Unlike the present case, however, it was not clear whether the victim had been killed by one of the robbers or by the bystander, Wade. *Id.* at 487-88.

Majors was eventually captured and charged with felony murder. At trial, Majors requested that the following instruction be given:

> * * * The court instructs the jury that if you find and believe from the evidence that the shot that killed [the victim] was not fired by the defendant, or by someone with whom he was acting in concert, if any, then you must find the defendant not guilty.

Id. at 486. The trial court refused to give this instruction and Majors was convicted.

On appeal to the Missouri Supreme Court, Majors asserted that the failure to give this requested instruction constituted reversible error. The Missouri Supreme Court agreed and reversed Majors' conviction. In so doing, the court held that this instruction was a "correct declaration of [the] law" and that "such an instruction was warranted upon the evidence adduced by the state." Id. at 488. Moore contends that although never specifically mentioning the agency theory or the felony murder statute, in ruling the way it did in *Majors*, the Missouri Supreme Court effectively embraced the agency theory of felony murder.

The Missouri Court of Appeals agreed with Moore and concluded that "under the holding of *Majors* and under the facts of this case, [Moore] could not be found guilty of felony murder [since the killing was by one with whom he was] not acting in concert." *State* v. *Moore*, No. 38,783, slip op. at 7-8 (Mo.App. June 27, 1978). The court of appeals, however, while recognizing that it "would be obliged to reverse [Moore's] conviction for first degree murder by reason of *State* v. *Majors*," *id.* at 9, concluded that the "holding [of *Majors*] should be reexamined," *id.* at 8. Consequently, the court of appeals transferred Moore's case to the Missouri Supreme Court. The court did so under article 5 section 10 of the Missouri constitution which allows a case to be transferred to the state supreme court "for the purpose of *reexamining* the *existing* law * * *." Mo. Const. art. V, § 10 (emphasis added); *see to the same effect* Mo. R. Crim. P. 30.27 and Mo. R. C. P. 83.02.

The Missouri Supreme Court, following transfer from the court of appeals, specifically recognized *Majors* as a felony murder case. *State* v. *Moore*, 580 S.W.2d at 751. The supreme court also acknowledged that this was the first Missouri case since *Majors* in which a bystander rather than the defendant or an accomplice was responsible for the killing. *Id.* Given this fact, the court stated that the specific question presented was "whether the felony-murder rule applies to the circumstances of this case where the evidence clearly indicates that the fatal shot was not fired by * * * [Moore] or an accomplice but by a bystander attempting to thwart the robbery." *Id.*

Answering this question in the affirmative, the Missouri Supreme Court explicitly overruled its prior decision in *Majors*, *id.* at 753, and held, directly contrary to *Majors*, that the applicability of the Missouri felony murder statute does not depend on whether "the fatal act was done by the defendant, an accomplice, another victim, or a bystander * * *." *Id.* at 752. Rather, "[t]he significant factor is whether the death was the natural and proximate result of the acts of the appellant or an accomplice." *Id.*

In this case, the court concluded, Moore reasonably could have foreseen that the robbery attempt would meet with resistance and that this resistance might set into motion a chain of events that would result in the death of a bystander. *Id.* The court then affirmed Moore's conviction. In so doing, the Missouri Supreme Court clearly embraced the proximate cause theory of felony murder and rejected the agency theory of felony murder which it had previously adopted in *Majors*.

Under these circumstances, we can only conclude that the Missouri Supreme Court's decision in *Moore I* effected a significant change in Missouri's felony murder law as it existed prior to this decision and as a result expanded the scope of the felony murder statute beyond its previous boundaries. Because the Missouri Supreme Court's decision in *Moore I* effected a change in the law, which, if applied retroactively would materially expand Moore's criminal liability, this change cannot, consistent with *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), be applied retroactively if this change in the law was constitutionally unforeseeable. *Id.* at 354-55.

The state raises three contentions with respect to the issue of foreseeability. First, the state claims that the plain language of the statute provided Moore with fair warning that his conduct might, under these circumstances, be considered felony murder. The state's argument would be persuasive had Moore's case presented a question of first impression in Missouri. However, in light of *State* v. *Majors*, which narrowed the scope of the felony murder statute, we are not confronted with the statute "as written" but rather as judicially construed. As such, whether or not the plain language of the statute would, absent prior judicial construction, give Moore fair warning that his conduct might constitute felony murder is irrelevant. Instead, we must determine whether the expanded scope of the Missouri felony murder statute was foreseeable in light of its previously narrow construction.

The state next contends that even if *Majors* effectively restricted the scope of the Missouri felony murder statute cases decided after *Majors* left the issue sufficiently unsettled that the agency theory could no longer be relied upon as the law of the state. In making its argument, the state relies primarily on two cases: *State* v. *Glover*, 50 S.W.2d 1049 (Mo. 1932), and *State* v. *Adams*, 98 S.W.2d 632 (Mo. 1936). In these cases the court held that so long as the homicide was the "natural and proximate result [of the felony,]" *Glover*, 50 S.W.2d at 1053, or was "within the res gestae of the initial crime," *Adams*, 98 S.W.2d at 637, the homicide, even though unintentional, will be considered to have been committed in the course of perpetrating a felony. As a result, the felony murder statute will be applicable. The state argues that these statements, which certainly demonstrate an element of proximity in Missouri's felony murder analysis, undermined the *Majors* decision and left its viability unsettled. We disagree.

In both *Glover* and *Adams*, either the defendant or an accomplice was clearly identified as the one directly responsible for the killing. Thus, the question of identification, which was crucial to the *Majors* decision (and to the agency theory), was not before the court. Rather, in both of these cases, the issue presented was whether the death was sufficiently related to the felony to be considered as having been committed in the perpetration of the felony.

This issue, however, along with the court's discussion of the "natural and proximate result" or the "res gestae" of the felony is equally relevant in a jurisdiction that has adopted the agency theory as in a jurisdiction that has adopted the proximate cause theory. As previously noted, both theories are identical except for the agency theory's threshold requirement that the defendant or an accomplice be identified as the killer. Once this element has been established, however, both theories require that a proximate cause relationship between the felony and the murder be proven. Thus, the Missouri

Supreme Court's discussion of this element in *Glover* and *Adams*, neither of which presented any issue of identification, casts no shadow on the *Majors* threshold requirement that the defendant or an accomplice be identified as the killer.

The state points to several other cases which it claims undermine *Majors*. However, as with *Glover* and *Adams*, in none of these cases was the identity of the killer in question. As such, the issue presented in *Majors* and, more importantly, the court's decision in *Majors* were never reexamined or questioned by the Missouri courts. *See State* v. *Messino*, 30 S.W.2d 750 (Mo. 1930) (defendant or accomplice killed police officer while escaping from a bank robbery) and *State* v. *Mullen*, 532 S.W.2d 794 (Mo.App. 1975) (defendant fired the fatal shot during a robbery). We concluded that no Missouri case decided after *Majors* and prior to Moore's crime undermined the requirement established in *Majors* that either the defendant or an accomplice must actually kill the victim for the felony murder statute to be applicable.

Finally, the state argues that the adoption of the proximate cause theory in other jurisdictions provides notice that Missouri might adopt the same interpretation. Again, had the Missouri statute been previously unconstrued, the state's argument might have merit. However, in light of prior unquestioned Missouri authority directly on point, it cannot reasonably be argued that cases from other jurisdictions supply the fair warning that is constitutionally required by the due process clause. *See Bouie*, 378 U.S. at 359-60.

We conclude that the change in law judicially effected in *Moore I* was constitutionally unforeseeable and thus cannot be applied retroactively. First, both the state court of appeals and the state supreme court recognized that *State* v. *Majors* was indistinguishable from the present case. Second, the court of appeals concluded that *Majors* represented the existing and controlling law and transferred Moore's case to the

state supreme court for the express purpose of re-examining that law. Third, in adopting the proximate cause theory, the state supreme court recognized that no case other than *Majors* had presented the precise question involved and then specifically overruled *Majors*. In so doing the court significantly expanded the scope of the state's felony murder statute. Finally, no case arising between *Majors* and *Moore I* undermined the authority of *Majors*.

Given these factors, we can only conclude that until *Moore I, Majors* was the controlling law, and no intervening case had been found which in any way challenged or weakened its authority. As a result, the change in law adopted by the state supreme court expanding the scope of the state's felony murder statute was constitutionally unforeseeable. Therefore, the new rule may not be applied retroactively to Moore's case and may only be applied to conduct occurring after the date of the decision in *Moore I. See Bouie*, 378 U.S. at 354.

Accordingly, Moore's petition should be granted and the district court's order of dismissal must be reversed; however, Moore's release is dependent upon the completion of his sentence on the underlying first degree attempted robbery conviction that was affirmed by the Missouri Supreme Court in *State* v. *Moore*, 580 S.W.2d 747 (Mo. 1979) (en banc).

JOHN R. GIBSON, Circuit Judge dissenting.

The court today frees Brian Keith Moore, finding that he was deprived of due process by the Missouri Supreme Court's retroactive application of an unforeseeable construction of Missouri's felony murder statute. In so holding, the court ignores the ambiguity that existed in Missouri's felony murder doctrine prior to Moore's case and fails, directly contrary to *Wainwright* v. *Goode*, 104 S. Ct. 378 (1983), to give deference to Missouri court decisions on an issue of state law. Thus, I respectfully dissent.

The court's decision today depends on its conclusion that

the Missouri Supreme Court in its review of Moore's conviction for felony murder "explicitly overruled its prior decision in *Majors* * * * and held, directly contrary to *Majors*, that the applicability of the Missouri felony-murder statute does not depend on whether 'the fatal act was done by the defendant, an accomplice, another victim, or a bystander * * *.' " *Supra* at 8. In so concluding, the court both gives *State* v. *Majors*, 237 S.W. 486 (Mo. 1922), and unjustifiably expansive reading and overstates the supreme court's actual holding in *State* v. *Moore*, 580 S.W.2d 747, 751 (Mo. 1979) (en banc) (*Moore I*).

In *Majors*, as the supreme court pointed out in its discussion of the case in *Moore I*,

> [t]he jury was instructed that if it found that the defendant or one of his accomplices shot the deceased in an effort to commit a crime, he would be guilty of murder. The murder conviction was reversed and the case remanded because the trial court failed to give converse instructions proferred by defendant which required a verdict of not guilty if the jury found that the fatal shot was fired by someone other than the defendant or someone acting in concert with him. The court without elaboration stated that such an instruction was a correct declaration of the law.

580 S.W.2d at 751. Thus, the essential issue in *Majors* was the failure to give a converse instruction: "[I]t has been repeatedly held in this state that the defendant in a criminal case is entitled, upon request[,] to an instruction setting forth the converse of the state's instruction on the principal fact." 2237 S.W. at 488. Nowhere in *Majors*, as Judge Rendlen pointed out in *Moore I*, does there appear "a statement of the rationale for the requirement that the fatal act be performed by defendant or someone acting in concert with him." 580 S.W.2d at 751. Thus, if *Majors* did adopt the agency theory of felony murder, it did so in a highly abbreviated, elliptical fashion. In adopting the proximate cause theory of felony

murder, the *Moore I* court did not "explicitly overrule" *Majors* but instead simply noted, surely in further reference to the uncertain nature of the *Majors* holding, that "[i]nsofar as *Majors* * * * [is] inconsistent with this opinion, * * * [it] must no longer be followed." 580 S.W.2d at 753.

The *Moore I* court not only addressed the indistinct nature of *Majors* but also treated the subsequent cases of *State* v. *Adams*, 339 Mo. 926, 98 S.W.2d 632 (1936), and *State* v. *Glover*, 330 Mo. 709, 50 S.W.2d 1049, 1053 (1932), in which it was made clear that "[e]ven though the homicide be unintentional, yet if it be committed in the course of perpetrating the felony, and is a natural and proximate result thereof, such as the defendant reasonably was bound to anticipate, * * * the homicide will be first degree murder under the statute." *Glover*, 50 S.W.2d at 1053. After discussing the law of there cases, the *Moore I* court then determined that "[w]hether the fatal act was done by the defendant, an accomplice, another victim, or a bystander is * * * not controlling. The significant factor is whether the death was the natural and proximate result of the acts of the appellant or of an accomplice." 580 S.W.2d at 752.

Thus, after *Glover* and *Adams*, it could not be said that the courts of the state of Missouri had without question adopted the agency theory of the felony murder doctrine. A fair issue existed as to whether this or the proximate cause theory was the rule. Indeed, this was the conclusion reached by the Missouri Court of Appeals in its postjudgment review of Moore's conviction:

> In light of the test which the Missouri Supreme Court adopted in *Glover* in 1932, we think that since the victim's death was the natural and proximate result of defendant's action's, movant was put on notice that his conduct would be considered first degree murder. Consequently, the construction put on * * * [the felony murder statute] by the Missouri Supreme Court could not be

> considered to be "unexpected" or "indefensible" and can be given retroactive application to defendant without violating the due process clause of the United States Constitution.

Moore v. *State*, 651 S.W.2d 578, 581 (Mo. Ct. App. 1983).

This court today seeks to subordinate *Glover* and *Adams* to *Majors*, arguing that those cases address only the second phase of a two-part process in the agency theory of felony murder. The court argues that under this theory the state must first identify the defendant or an accomplice as a killer, and then show that "the killing was a natural and proximate result of the felony." *Supra* at 5. Under the court's analysis, then, *Glover* and *Adams* accept *sub silentio* the threshold requirement of identity in the agency theory. Identity, however, may just as easily be subsumed to the notion of natural and proximate results. Those states which follow the proximate cause theory of felony murder simply make the inquiry as to identity a part of the rule itself. Identification then becomes part of the general issue of foreseeability: Would someone committing a felony reasonably expect that someone other than himself or his accomplice might kill someone in the course of the felony? But this, of course, is the very test that *Glover* and *Adams* establish.

Thus, the holding of *Majors* is limited, since that case primarily involved the propriety of the refusal of a converse instruction. Insofar as *Majors* did adopt the agency theory of felony murder, Missouri's courts clearly have viewed *Glover* and *Adams* as intervening cases presenting a different approach to the felony murder doctrine. In failing to give deference to the Missouri Supreme Court's holding in Moore's case, the court overlooks the command of *Wainwright* v. *Goode* that "the views of the state's highest court with respect to state law are binding on the federal courts." 104 S.Ct. at 382.

Further, the court's holding today stems from a mis-

application of the statement in *Bouie* that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) (quoting J. Hall, *General Principles of Criminal Law* 61 (2d ed. 1960)). *Bouie* surely does not suggest that a state supreme court cannot clarify an ambiguity in its criminal law—something quite different from construing statutes in an unexpected and indefensible way—without offending a defendant's due process rights. In addition, *Bouie* involved a new interpretation of a breach-of-the-peace ordinance violated in a sit-in demonstration. The result was to create criminal penalties where none had before existed. The *Bouie* court limited its holding by noting that "[a]pplication of this rule is particularly compelling where, as here, the petitioner's conduct cannot be deemed improper or immoral." 378 U.S. at 326. Here, in contrast, when Moore participated in the robbery, he realized that resistance might follow. His conduct was unlawful from the beginning, which, of course, is reason for application of the felony murder rule. The net result is that the court today stretches *Bouie* far beyond its reasoning and its holding.

As the court today in freeing Brian Keith Moore does violence to *Wainwright*, *Bouie*, and the Missouri courts' interpretation of the law of their state and substitutes its own misreading of that law, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRIAN KEITH MOORE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 83-2748C(3)**
	)	
DONALD WYRICK, et. al.,	)	
	)	
Respondents.	)	

ORDER

This matter is before the Court on the petition of Brian Keith Moore for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b), this matter was referred to United States Magistrate S. Bahn for review and recommended disposition. In his Review and Recommendation, the Magistrate recommends that petitioner's claim should be dismissed without further proceeding.

Having carefully considered the entire record, including the Magistrate's Review and Recommendation and petitioner's objections thereto,

IT IS HEREBY ORDERED that petitioner's objections be and the same are overruled.

IT IS HEREBY FURTHER ORDERED that the Review and Recommendation of the United States Magistrate be and the same is sustained, adopted, and incorporated herein.

IT IS HEREBY FURTHER ORDERED that petitioner's claim be and the same is dismissed.

DATED this 24th day of May, 1984.

/s/ William L. Hungate
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRIAN KEITH MOORE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 83-2748C(3)**
	)	
DONALD WYRICK, Warden, et. al.,	)	
	)	
Respondents.	)	

MAGISTRATE'S REVIEW AND RECOMMENDATION

Brian Keith Moore a/k/a Brian K. Moore-Bey has filed a petition in the Federal District Court seeking habeas corpus, pursuant to §2254. Petitioner alleges that he was denied due process of law under the Fifth and Fourteenth Amendments and that his conviction of first degree felony murder was ascribed to an *ex post facto* law interpretation of Missouri's felony murder statute.

Petitioner had filed a previous case of similar flavor in the District Court, No. 80-1541C(2). This case was ultimately dismissed by the District Court on motion of the petitioner on July 16, 1982. The reviewing Magistrate had recommended that the Court make said dismissal because of lack of exhaustion. The case has since been presented to the Missouri courts which sustained the trial court's position on this very issue in *Moore* v. *State,* 651 S.W.2d 578 (Mo.App. 1983). Therefore, custody and exhaustion are conceded and the application for the writ is ripe for consideration.

This interesting legal problem grows out of a holdup wherein state's evidence showed that petitioner and two others entered a tavern called the Emergency Room Lounge, and announced a holdup. A gun battle ensued between a customer in the tavern, Alfred Williams, and the robbers. The robbers fled and it was discovered that another customer, one Lawrence Meadows, had been killed by a bullet subsequently determined to have come from Williams' gun. It was also discovered that two other persons had been caught in the gunfire.

Moore has assumed the position that his conduct could not constitute first degree murder under Missouri's relevant statute, because he nor one of his accomplices fired the shot that killed the victim. He claims that prior Missouri case law held that a defendant could not be convicted of felony-murder if the fatal shot was fired by someone attempting to thwart the felony. *State* v. *Majors*, 237 S.W. 486 (Mo. 1922); *State* v. *Glenn*, 429 S.W.2d 225 (Mo. 1968). Moore claims that the state court's present reversal of these prior holdings deprives him of due process.

Missouri's courts cleared up the ambiguity in *State* v. *Glover*, 50 S.W.2d 1049 (Mo. 1932), when it affirmed a felony murder conviction:

> [E]ven though the homicide be unintentional yet, if it be committed in the course if perpetrating the felony, and is a *natural and proximate result* thereof, such as the defendant reasonably was bound to anticipate—and therefore especially where the *felony is dangerous and betokens a reckless disregard of human life*—the homicide will be first degree murder under the statute. (Emphasis ours).

Federal courts have considered an almost identical claim in *United States, ex rel Almeida* v. *Rundle*, 383 F.2d 421 (3rd Cir. 1967), *cert. denied*, 393 U.S. 863 (1968). In the *Almeida* robbery, a gun battle ensued and Almeida produced ballistics

evidence that an off-duty policeman who was killed, was actually shot by another policeman's gun. Pennsylvania's courts held that the source of the fatal shot was irrelevant so long as the death was a foreseeable result of the commission of the felony involved.

When this case was presented to the Missouri Court of Appeals in *Moore* v. *State, supra,* at the time Moore was forced to exhaust his state remedies, the court reasoned at p. 581:

> ". . . we think that since the victim's death was the natural and proximate result of the defendant's, actions, movant was put on notice that his conduct would be considered first degree murder.
>
> ". . . Consequently, the construction put on §559.010 by the Missouri Supreme Court could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution."

Missouri's courts referring to *Almeida, supra,* noted that:

> ". . . appellant's conviction for felony murder in circumstances similar to those here was 'not so shockingly in contravention of preexisting notions and policies in the law as to call into play the protective force of the Fourteenth Amendment."

When a person does an act which he well knows to be a violation of some law, he cannot be heard to complain that a statute, construed "to cover his conduct in a way that does not do violence to the ordinary understanding of the English language offends the 14th Amendment." *Knutson* v. *Brewer,* 619 F.2d 747 (8th Cir. 1980).

Employing the rationale and reasoning of the *Almeida* court and Missouri's court of appeals, we conclude that the conclusions reached by both of these courts was neither unpredictable nor a clear reversal of some prior policy which

could have acquitted petitioner. Consequently, there is no apparent constitutional violation and petitioner's claim should be dismissed without further proceeding.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.S. §636(b); failure to object could bar any appeal.

Dated this 30th day of March, 1984.

/s/ William S. Bahn
United States Magistrate

APPENDIX D

AMENDED ORDER
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 84-1926-EM

BRIAN KEITH MOORE, *Appellant,*	)	
v.	)	**Appeal from the United States District Court for the Eastern District of Missouri**
DONALD W. WYRICK, etc., et. al., *Appellees.*	)	

Appellee's petition for rehearing en banc has been considered by the court and is denied, with dissents from the denial by Judges McMillian, Arnold, John R. Gibson, and Bowman.

The court on its own motion substitutes the attached page 11 for page 11 in the opinion as originally filed.

September 9, 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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CLERK

NO. 85-968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BILL ARMONTROUT,
WARDEN, MISSOURI STATE PENITENTIARY,
Petitioner,

vs.

BRIAN KEITH MOORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(d) requires a federal court to presume that the Missouri appellate court correctly interpreted the fourteenth amendment's due process clause when it retroactively applied to respondent an expanded and unforeseeable interpretation of Missouri's felony-murder statute?

2. Whether a federal court must defer to the Missouri appellate court's interpretation of the federal constitution which permitted a retroactive application of an expanded and unforeseeable interpretation of Missouri's felony-murder statute?

3. Whether the Court of Appeals for the Eighth Circuit correctly interpreted Bouie v. City of Columbia, 378 U.S. 347 (1964) when it held that the Missouri Supreme Court retroactively applied an expanded and unforeseeable interpretation of Missouri's felony-murder statute to affirm respondent's conviction and thereby denied respondent due process of law as required by the fourteenth amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

I. Factual Background 1

II. Procedural History 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

I. THE FEDERAL HABEAS STATUTE, 28 U.S.C. § 2254(d), DOES NOT REQUIRE A FEDERAL COURT TO PRESUME THAT THE MISSOURI APPELLATE COURT CORRECTLY INTERPRETED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHEN IT RETROACTIVELY APPLIED TO RESPONDENT AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE 6

A. The Missouri Court Of Appeals' Interpretation Of Bouie v. City of Columbia And The Fourteenth Amendment's Due Process Clause Cannot Be Construed As A "Factual" Issue 6

B. Even If The Retroactivity Issue Were Characterized As A Mixed Question Of Law And Fact, The Statutory Presumption Under 28 U.S.C. § 2254(d) Does Not Apply 7

II. A FEDERAL COURT SHOULD NOT DEFER TO THE MISSOURI APPELLATE COURT'S INTERPRETATION OF THE FEDERAL CONSTITUTION WHICH PERMITTED A RETROACTIVE APPLICATION OF AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE 9

A. Bouie v. City of Columbia and Weaver v. Graham Support the Eighth Circuit's Independent Review of the Missouri Appellate Court's Constitutional Application of the Fourteenth Amendment's Due Process Clause 9

B. The Eighth Circuit's Ruling Does Not Conflict With Wainwright v. Goode 10

Page

III. THE EIGHTH CIRCUIT CORRECTLY INTERPRETED BOUIE WHEN IT HELD THAT THE MISSOURI SUPREME COURT RETROACTIVELY APPLIED AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY MURDER STATUTE TO AFFIRM RESPONDENT'S CONVICTION AND THEREBY DENIED RESPONDENT DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT. 12

A. The Eighth Circuit Correctly Interpreted And Applied Bouie's Due Process Test Which It Defined In Terms Of "Fair Warning," "Fair Notice," And "Forseeability" Of The State Court's Change In Its Criminal Law 12

B. Petitioner, The Missouri Court of Appeals (Moore III) And The Eighth Circuit Dissenting Judge Have Applied An Erroneous Interpretation Of Bouie 14

C. The Language of Missouri's Felony-Murder Statute And The Law Of Other States Did Not Give Respondent Fair Warning Of The Missouri Supreme Court's Reversal Of Its Former Interpretation Of Missouri's Felony-Murder Statute 15

IV. THE EIGHTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY SUPREME COURT OR CIRCUIT COURT OPINION, DOES NOT ESTABLISH ANY NEW PRECEDENT, AND, THEREFORE, DOES NOT MERIT THIS COURT'S REVIEW 16

V. CONCLUSION 17

APPENDIX A: Text of 28 U.S.C. § 2254(d) A-1

APPENDIX B: Text of State v. Moore, No. 38,783, slip op., (Mo. Ct. App. June 27, 1978) A-3

TABLE OF AUTHORITIES

Cases:	Page
Bouie v. City of Columbia, 378 U.S. 347 (1964)	passim
Caldwell v. Mississippi, 472 U.S. ___, 86 L. Ed. 2d 231 (1985)	11
Douglas v. Buder, 412 U.S. 430 (1973)(per curiam)	12
Hamling v. United States, 418 U.S. 87 (1974)	12
Kolender v. Lawson, 461 U.S. 352 (1983)	12
Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam)	7
Marshall v. Lonberger, 459 U.S. 422 (1983)	8
Miller v. Fenton, No. 84-5786, slip op. (U.S. Dec 3, 1985).	7
Moore v. State, 651 S.W.2d 578 (Mo. Ct. App. 1983)	passim
Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985)	passim
Patton v. Yount, 467 U.S. ___, 81 L. Ed. 2d. 847 (1984).	8
Rose v. Locke, 423 U.S. 48 (1975) (per curiam)	16
Rushen v. Spain, 464 U.S. 114 (1983) (per curiam)	8
State v. Blackmon, 587 S.W.2d 292 (Mo. Ct App. 1979)	13
State v. Glenn, 429 S.W.2d 225 (Mo. 1968)	passim
State v. Glover, 50 S.W.2d 1049 (Mo. 1932)	3
State v. Majors, 237 S.W. 486 (Mo. 1922)	passim
State v. Moore, No. 38,783, slip op. (Mo. Ct. App. June 27, 1978)	passim
State v. Moore, 580 S.W. 2d 747 (Mo. 1979) (en banc)	passim
Summer v. Mata, 455 U.S. 591 (1982) (per curiam)	7
United States v. Wiltberger, 5 Wheat 76, 5 L. Ed. 37 (1820).	15
Wainwright v. Goode, 464 U.S. 78 (1983)	10, 11
Wainwright v. Witt, 469 U.S. ___, 83 L. Ed. 2d 841 (1985)	8
Weaver v. Graham, 450 U.S. 24 (1981)	10

Constitutional and Statutory Authorities:	
U.S. CONST., amendment XIV	passim
MO. CONST., art. V, § 10.	passim

Constitutional and Statutory Authorities: (cont'd) Page

28 U.S.C. § 2254(d). . . . . passim

28 U.S.C. § 2254 (d)(7) 8

Mo. Rev. Stat. § 559.010 (1969) (repealed September 28, 1975). . . . . passim

Rules:

U.S. Sup. Ct. R. 17 17

Mo. Sup. Ct. R. 30.27 2

Mo. Sup. Ct. R. 83.02 2

Secondary Authorities:

Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229 (1985) 6

Respondent, Brian Keith Moore, respectfully requests this Court to deny the petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner failed to include the provisions of 28 U.S.C. § 2254(d) which respondent has included in Appendix A to this brief.

STATEMENT OF THE CASE

I. Factual Background

Petitioner and respondent have never disputed the relevant facts during the litigation of respondent's habeas petition. The disagreement between the parties rests solely on legal grounds: the proper interpretation and application of the fourteenth amendment's due process clause to the facts of this case.

On June 28, 1975, respondent, Brian Keith Moore, and two accomplices attempted to rob the Emergency Room Lounge in the City of St. Louis. During the course of the attempted robbery, Albert "Rip" Williams, a patron of the Lounge, exchanged gunshots with Moore and his accomplices. In the exchange of gunfire, Rip Williams shot and killed Lawrence Meadows, another patron of the Lounge. Petitioner has never disputed at trial or during any appeal that Williams, a non-participant in the robbery, fired the shots which killed Meadows.

The State of Missouri charged Moore with murder in the first degree and attempted robbery in the first degree. Moore's first trial on these charges resulted in a hung jury. On November 15, 1976, a second jury convicted Moore of both the murder and attempted robbery charges.

II. Procedural History

Moore appealed his convictions to the Missouri Court of Appeals for the Eastern District. He contended that the State

improperly convicted him of felony-murder, under Mo. Rev. Stat. § 559.010 (1969) (repealed Sept. 28, 1975), because neither he nor one of his accomplices fired the bullet that killed Meadows.

The Missouri Court of Appeals agreed with Moore. That court found that the Missouri Supreme Court, in State v. Majors, 237 S.W. 486 (Mo. 1922), had interpreted Missouri's felony-murder statute in a case involving facts that were "remarkably similar" to the case at bar. In Majors, the Missouri Supreme Court held that Missouri's felony-murder statute only applied where a homicide was committed by the defendant or his accomplice. State v. Moore, No. 38,783, slip op. at 7 (Mo. Ct. App. June 27, 1978) (Respondent's Appendix at A-10) (hereinafter referred to as "Moore I").[1] Moore I held that "[u]nder the holding of Majors and under the facts of this case, defendant could not be found guilty of the felony murder of the victim as he was not acting in concert with 'Rip' Williams, who actually fired the fatal shot." Id. at 7-8. (Respondent's Appendix at A-11)

The Missouri Court of Appeals transferred the case to the Missouri Supreme Court pursuant to Article V, § 10 of the Missouri Constitution which permits transfer to the Missouri Supreme Court "for the purpose of re-examining the existing law." (emphasis added); see also Mo. S. Ct. R. 30.27 and 83.02. The court opined:

> There has been no further pronouncement by the supreme court on the precise issue before us since the 1922 Majors case, and we believe its holding should be re-examined . . . .
>
> While we would be obliged to reverse defendant's conviction for first degree murder by reason of State v. Majors, supra, we certify this case to the Supreme Court for reconsideration of the

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[1]Respondent has reproduced the Missouri Court of Appeals' Moore I opinion in Appendix B to this brief. This Court should not confuse respondent's identification of "Moore I" with the Eighth Circuit's different identification of "Moore I" with the Missouri Supreme Court's opinion concerning Moore's appeal.

> felony-murder doctrine as it would apply to a person who perpetrates a felony where another is killed by someone resisting a felony.

Moore I at 8-9. (Respondent's Appendix at A-11 and A-13)

The Missouri Supreme Court reexamined its former interpretation of Missouri's felony-murder statute. The court decided to adopt a new "proximate cause" theory of the felony-murder doctrine.[2] The court overruled Majors and State v. Glenn, 429 S.W.2d 225 (Mo. 1968), both of which promulgated the "agency" theory of felony-murder, and stated that those cases "must no longer be followed." State v. Moore, 580 S.W.2d 747, 753 (Mo. 1979) (en banc) (hereinafter referred to as "Moore II"). Despite Moore II's adoption of an expanded application of Missouri's felony-murder statute, the Missouri Supreme Court failed to address the issue of whether the fourteenth amendment's due process clause precluded it from retroactively applying its new holding to Moore.

Moore attacked the constitutionality of his felony-murder conviction in a motion for post-conviction relief in the Missouri courts. In Moore v. State, 651 S.W.2d 578 (Mo. Ct. App. 1983) (hereinafter referred to as "Moore III"), a second panel of the Missouri Court of Appeals addressed his due process argument. Unlike the Moore I panel, the Moore III panel did not think that Majors' agency theory of felony-murder required the court of appeals to vacate Moore's felony-murder conviction. The court based its decision solely on its interpretation of the fourteenth amendment's due process clause and this Court's decision in Bouie v. The City of Columbia, 378 U.S. 347 (1964). Moore III at 581. Thus, the court of appeals held:

> In light of the test which the Missouri Supreme Court adopted in Glover in 1932 [State v. Glover,

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[2]The Eighth Circuit described the important differences between the "agency" and "proximate cause" theories of felony-murder. Petitioner's Appendix at A-4 to A-5.

> 50 S.W.2d 1049 (Mo. 1932) (defendant, who committed an arson-homicide, held liable for felony-murder)], we think that since the victim's death was the natural and proximate result of defendant's actions, movant was put on notice that his conduct would be considered first degree murder. Consequently, the construction put on § 559.010 by the Missouri Supreme Court could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution. Id.

The Eighth Circuit determined that the Moore III court misinterpreted and misapplied Bouie. Moore v. Wyrick, 766 F 2d 1253 (8th Cir. 1985) (hereinafter referred to as "Moore IV"); Petitioner's Appendix A (hereinafter referred to as "P.A.") at A-1. The Eighth Circuit therefore vacated Moore's felony-murder conviction, and held that Moore did not have fair warning of the Missouri Supreme Court's unforeseeable interpretation of Missouri's felony-murder statute. Id.[1]

SUMMARY OF THE ARGUMENT

Bouie v. City of Columbia held that a state may not retroactively apply an unforeseeable interpretation of a state's criminal statute. The Eighth Circuit applied the Bouie due process test to vacate respondent's conviction. The court held that the Missouri Supreme Court's decision to apply retroactively a new and unforeseeable "proximate cause" theory of

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[1]The Eighth Circuit ordered Moore's release dependent upon the completion of his attempted robbery conviction. Moore IV, P.A. at A-11. The court presumably desired to give the State of Missouri an opportunity to request a state court to reinstate Moore's attempted robbery conviction which had previously been vacated on double jeopardy grounds in light of Moore's felony-murder conviction. The issue is moot, however, because Moore has already completed serving his sentence for attempted robbery.

Moore was incarcerated for more than ten years before he was released in accordance with the Eighth Circuit's order. Petitioner did not make any effort to obtain a stay of the Eighth Circuit's order.

Missouri's felony-murder statute deprived respondent of due process of law.

The federal habeas statute, 28 U.S.C. § 2254(d), requires a federal court to presume that a state court correctly decided factual issues which were determined at an evidentiary hearing. An evidentiary hearing never occurred at the state or federal level as the facts have not been in dispute. The parties have only disputed purely legal questions concerning the interpretation and application of Bouie's due process standard. Therefore, the Eighth Circuit need not defer to the legal conclusions of the Missouri Court of Appeals in Moore III.

A federal court should also not defer to the Missouri appellate court's interpretation of the federal constitution which permitted a retroactive application of an expanded and unforeseeable interpretation of Missouri's felony-murder statute. The Eighth Circuit never decided a single question of Missouri law. It merely applied Bouie's due process test to an existing body of Missouri common-law. If the Eighth Circuit had deferred to the Missouri appellate court on the retroactivity issue, it would have abdicated its constitutional duty to interpret and apply federal constitutional law.

The Moore IV court correctly characterized Bouie's due process constitutional test in terms of "fair warning," "fair notice," and "unforeseeability." It properly found that Moore did not have fair warning of the Missouri Supreme Court's decision to overrule its long-standing precedent of State v. Majors which had adopted a narrow "agency" theory of Missouri's felony-murder statute.

The Eighth Circuit's opinion does not conflict with any opinion of this Court or any other federal or state court. The opinion has little precedential value as it merely represents one of many federal and state cases which has applied Bouie

and its progeny. Accordingly, this Court should deny the petition for writ of certiorari to the Court of Appeals for the Eighth Circuit.

ARGUMENT

I. THE FEDERAL HABEAS STATUTE, 28 U.S.C. § 2254(d), DOES NOT REQUIRE A FEDERAL COURT TO PRESUME THAT THE MISSOURI APPELLATE COURT CORRECTLY INTERPRETED THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHEN IT RETROACTIVELY APPLIED TO RESPONDENT AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE.

A. The Missouri Court Of Appeals' Interpretation Of Bouie v. City of Columbia And The Fourteenth Amendment's Due Process Clause Cannot Be Construed As A "Factual" Issue.

The Missouri Supreme Court never addressed the issue of whether it could retroactively apply to Moore its new interpretation of Missouri's felony-murder statute in Moore I. The Missouri Court of Appeals held, however, that the Missouri Supreme Court's affirmance of Moore's felony-murder conviction did not violate Moore's due process rights. Moore III, 651 S.W.2d at 578. The court based its holding solely on its interpretation of Bouie. Id. The constitutional issue under Bouie was purely a legal question which did not include any factual determinations. The resolution of this issue required the Missouri Court of Appeals to apply the Bouie due process standard to various Missouri Supreme Court opinions which had previously interpreted Missouri's felony-murder statute.

Factual assertions generally involve "inquiries about who, when, what, and where." Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 235 (1985). These issues were resolved at Moore's trial and have never been disputed throughout the course of Moore's habeas litigation.

The federal habeas statute, 28 U.S.C. § 2254(d), only requires a federal court to presume that a state court correctly decided factual issues. Thus, the habeas statute presumes

that the state court's findings are correct only if they are based on "a determination after a hearing on the merits of the factual issue." Id. The Missouri courts did not hold and could not have held an evidentiary hearing to resolve Moore's constitutional claims which required a determination of purely legal issues.

B. Even If The Retroactivity Issue Were Characterized As A Mixed Question Of Law And Fact, The Statutory Presumption Under 28 U.S.C. § 2254(d) Does Not Apply.

Even if one characterized the constitutional retroactivity issue as a "mixed question of law and fact" or a resolution of an "ultimate constitutional question," the statutory presumption under 28 U.S.C § 2254(d) does not apply. Sumner v. Mata, 455 U.S. 591, 597 and n. 10 (1982) (per curiam). Thus, the Eighth Circuit had not only the right but also the duty to review independently the Missouri Supreme Court's and the Missouri Court of Appeals' decisions in Moore II and III.

This Court's recent decision in Miller v. Fenton, No. 84-5786, slip op. (U.S. Dec. 3, 1985) offers additional justification for the Eighth Circuit's independent constitutional review in Moore IV. The Miller Court acknowledged that "the decision to label an issue a 'question of law,' 'a question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." Miller, slip op. at 9. Thus, this Court has deferred to a state judge's factual determination when the issue involves an "inquiry into state of mind." Id. at 9 (citing Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam) (determination of defendant's competency to stand trial)). Similarly, this Court has deferred to a state trial judge's determination of the credibility of witnesses which involves the subjective evaluation of an individual's demeanor. Miller, slip op. at 10 (citing Patton v. Yount, 467

U.S. ____, 81 L. Ed. 2d 847 (1984) ,determination of a juror's impartiality); Wainwright v. Witt, 469 U.S. ____, 83 L. Ed. 2d 841 (1985) (determination that a juror in a capital murder case was biased and, therefore, properly excluded for cause); see also Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) (evaluation of juror's misconduct); Marshall v. Lonberger, 459 U.S. 422 (1983) (voluntariness of guilty plea).

None of the issues in the case at bar depend on a trial judge's subjective evaluation of an individual's state of mind or demeanor. No special justification exists, therefore, for a federal court to presume that the Missouri Court of Appeals correctly adjudicated Moore's constitutional claim in Moore III.

Miller also recognized that when the "state-court judge is not in an appreciably better position than the federal court," the federal court should independently apply the constitutional standard to the facts. Miller, slip op. at 13. This Court expressed special concern about "strip[ping] a federal court of its primary function as expositor of law." Id. at 10. In contrast to the views expressed in Miller, petitioner suggests that the federal courts should abdicate their responsibility to interpret the Constitution to the state courts. Miller has soundly rejected petitioner's theory.

Even if one could somehow characterize the constitutional due process retroactivity issue as a factual issue, the habeas statute would still not allow a federal court to presume that a state court correctly decided the issue. 28 U.S.C. § 2254(d)(7) directs the federal habeas court not to presume that a state court's factual finding is correct when the "applicant was otherwise denied due process of law in the State court proceeding." Moore's due process claim triggers this statutory exception to the presumption rule and authorizes independent federal review of the Missouri courts' findings.

II. A FEDERAL COURT SHOULD NOT DEFER TO THE MISSOURI APPELLATE COURT'S INTERPRETATION OF THE FEDERAL CONSTITUTION WHICH PERMITTED A RETROACTIVE APPLICATION OF AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY-MURDER STATUTE.

A. Bouie v. City of Columbia and Weaver v. Graham Support the Eighth Circuit's Independent Review of the Missouri Appellate Court's Constitutional Application of the Fourteenth Amendment's Due Process Clause.

The Missouri Supreme Court did not address Moore's fourteenth amendment argument in Moore I. The Missouri Court of Appeals, however, denied Moore's constitutional claim based on its analysis of the due process clause and its understanding of Bouie. Moore III at 581. That court held that the Missouri Supreme Court's application to respondent of the proximate cause theory of Missouri's felony-murder statute "could not be considered to be either 'unexpected' or 'indefensible' and can be given retroactive application to defendant without violating the due process clause of the United States Constitution." Id.[4]

The Eighth Circuit independently applied Bouie's due process test to vacate the Missouri Supreme Court's affirmance of Moore's felony-murder conviction. Moore IV, P.A. at A-10. The Eighth Circuit vacated Moore's conviction because it held that he did not have fair warning or notice of the Missouri Supreme Court's unforeseeable expansion of Missouri's felony-murder statute. Id. at A-3, A-10.

The due process test established in Bouie requires a federal court to decide whether a state court has retroactively applied a new or expanded interpretation of a state criminal statute.

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[4]The use of the term "unexpected" and indefensible" suggests that the Missouri Court of Appeals, the Eighth Circuit dissenting judge, and petitioner have misunderstood Bouie's due process test. The Eighth Circuit majority correctly described the test in terms of "unforseeability," "fair notice" and "fair warning." Moore IV, P.A. at A-3; see also § III infra.

In Bouie, the Court analyzed the South Carolina Supreme Court's interpretations of South Carolina's trespass statutes. 378 U.S. at 356-60. Similarly, before the Eighth Circuit found a constitutional violation, it examined the Missouri Supreme Court's pre-Moore II interpretations of Missouri's felony-murder statute.

Bouie based its due process holding on the proposition that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." 378 U.S. at 353; see also id. at 362. This Court has repeatedly held that "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Weaver v. Graham, 450 U.S. 24, 33 (1981). The holding in Weaver should also apply to a federal court's due process analysis of whether a state court has retroactively applied a new interpretation of the state's criminal law. Accordingly, the Eighth Circuit had a duty to independently apply the Bouie due process standard without deferring to the Missouri Court of Appeals' constitutional analysis.

B. The Eighth Circuit's Ruling Does Not Conflict With Wainwright v. Goode.

Wainwright v. Goode, 464 U.S. 78, 84 (1983) held that a federal court should generally defer to a state court's interpretation of a question of state law. The Court found that a federal habeas court should have accepted the Florida Supreme Court's holding that a state trial judge did not rely on an improper factor in imposing the death penalty under Florida law. Id. This Court, therefore, reversed the Eleventh Circuit's finding of an eighth amendment violation which depended upon the resolution of an independent and distinct question of Florida law.

In contrast to the issue presented in Goode, the Bouie due process test requires a federal court to apply a constitutional standard which is inextricably connected with an examination of state law.[5] In applying the Bouie test, the federal court does not decide any questions of state law. It merely applies a federal constitutional standard to an existing body of state law.[6]

The Eighth Circuit applied Bouie's constitutional standard when it held that the Missouri Supreme Court retroactively applied to Moore an expanded version of Missouri felony-murder statute. If the court had deferred to the Missouri Court of Appeals on this issue, it would have abdicated its constitutional duty to interpret and apply federal constitutional law.[7]

Even if one assumes that the Eighth Circuit should have given some deference to the Missouri appellate courts, one wonders whether the federal court should have given greater deference to the Moore I or Moore III panel. The Moore I panel found that the pre-Moore state law compelled the court to reverse Moore's felony-murder conviction. On the other

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[5]Cf. Caldwell v. Mississippi, 472 U.S. _____, 86 L. Ed. 2d 231, 238 (1985) ("we will not assume that a state court decision rests on independent and adequate state grounds when the 'state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion.'" (citation omitted).

[6]The Missouri Court of Appeals conceded that the Missouri Supreme Court had "retroactively appli[ed]" to Moore its expanded interpretation of Missouri's felony-murder statute. Moore III at 581. The court's holding rested solely on its contention that the Missouri Supreme Court's retroactive ruling was neither "unexpected" nor "indefensible" under Bouie. Id.

[7]The Eighth Circuit and respondent have never questioned the Missouri Supreme Court's constitutional right to apply prospectively its new proximate cause theory of Missouri's felony-murder statute.

hand, the Moore III panel held that the Missouri Supreme Court's affirmance of Moore's conviction was not based on an unexpected development of Missouri law and did not, therefore, require that court to reverse the conviction. Petitioner's deference argument is rendered meaningless by the contradictory decisions of the Missouri Court of Appeals in Moore I and Moore III.

III. THE EIGHTH CIRCUIT CORRECTLY INTERPRETED BOUIE WHEN IT HELD THAT THE MISSOURI SUPREME COURT RETROACTIVELY APPLIED AN EXPANDED AND UNFORESEEABLE INTERPRETATION OF MISSOURI'S FELONY MURDER STATUTE TO AFFIRM RESPONDENT'S CONVICTION AND THEREBY DENIED RESPONDENT DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT.

A. The Eighth Circuit Correctly Interpreted And Applied Bouie's Due Process Test Which It Defined In Terms Of "Fair Warning," "Fair Notice," And "Unforeseeability" Of The State Court's Change In Its Criminal Law.

Bouie held that "[w]hen [an] . . . unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." 378 U.S. at 354-55; see also Moore IV, P.A. at A-2 to A-3. The Bouie Court characterized the due process test in terms of "fair warning" ten times throughout its opinion. Subsequent Supreme Court cases have described the test in terms of "fair warning," "fair notice," or "unforseeability." See Marks v. United States, 430 U.S. 188, 192 (1977); Hamling v. United States, 418 U.S. 87, 116 (1974); and Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam).[8]

The Eighth Circuit correctly applied Bouie's due process test to the Missouri Supreme Court's decision in Moore II which

[8]Cf. Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[the] void-for-vagueness doctrine [under the due process clause] requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . .")

affirmed respondent's felony-murder conviction by adopting an expanded interpretation of Missouri's felony-murder statute. The Eighth Circuit concluded that the Missouri Supreme Court in Moore II unforseeably changed the law and retroactively applied the change to affirm respondent's conviction. P.A. at A-3, A-10.

In analyzing the due process issue, the Eighth Circuit observed that the Missouri Supreme Court's decision in Moore II to adopt a "proximate cause" theory of Missouri's felony-murder statute represented a change in Missouri law. To embrace its new interpretation, the Missouri Supreme Court was compelled to overrule its long-standing precedents of State v. Majors, 237 S.W. 486 (Mo. 1922) and State v. Glenn, 429 S.W.2d 225 (Mo. 1968) which had established the "agency" theory of Missouri's felony-murder statute. Under that theory, the Moore I court recognized it was "obliged" to reverse Moore's felony-murder conviction. See Moore II at 753; Moore I at 8-9[*] (Respondent's Appendix at A-13)

The Eighth Circuit concluded that the Moore II court retroactively applied an unforeseeable change in Missouri law. In summarizing the reasons for its conclusion, the court wrote:

> First, both the state court of appeals and the state supreme court recognized that State v. Majors was indistinguishable from the present case. Second, the court of appeals concluded

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[*]The Eighth Circuit's dissenting opinion suggests that the Missouri Supreme Court "did not 'explicitly overrule' Majors . . . ." P.A. at A-13 (Gibson, J., dissenting). The language of the Missouri Supreme Court's opinion contradicts this analysis. Moore II, 580 S.W.2d at 753. Moreover, a subsequent Missouri Court of Appeals decision acknowledges that Moore II "overruled" Majors. State v. Blackmon, 587 S.W.2d 292, 293 (Mo. Ct. App. 1979).

> that Majors represented the existing and controlling law and transferred Moore's case to the state supreme court for the express purpose of re-examining that law. Third, in adopting the proximate cause theory, the state supreme court recognized that no case other than Majors presented the precise question involved and then specifically overruled Majors. In so doing the court significantly expanded the scope of the state's felony-murder statute. Finally, no case arising between Majors and Moore [II] undermined the authority of Majors. P.A. at A-10 to A-11.

In light of Majors and Glenn, petitioner and the dissenting Eighth Circuit judge were compelled to concede the "unsettled" or "ambiguous" nature of Missouri's pre-Moore II case-law. P.A. at A-15 (Gibson J., dissenting); Petition at 14. Respondent could not have had fair notice of prohibited criminal conduct clouded in such judicial confusion.

B. Petitioner, The Missouri Court of Appeals (Moore III) And The Eighth Circuit Dissenting Judge Have Applied An Erroneous Interpretation Of Bouie.

The Missouri Court of Appeals (Moore III) and the Eighth Circuit dissenting judge understood Bouie as establishing a test in which a due process violation occurs only if the retroactive judicial construction of the state criminal statute is "unexpected and indefensible." P.A. at A-15; see also Moore III at 581. The "unexpected and indefensible" language appears only once in Bouie when the court quotes from a textbook on criminal law. 378 U.S. at 354. As reflected by the post-Bouie Supreme Court cases, the Eighth Circuit majority's "unforeseeability-fair warning" test represents the correct interpretation of Bouie and its due process standard. See §III(a) supra.

The Eighth Circuit dissenting opinion and the Moore III court also erroneously suggest that Bouie limited its due process rule when it stated in dicta that "[a]pplication of this rule is particularly compelling where, as here, petitioner's conduct cannot be deemed improper or immoral." 378 U.S. at 362; see P.A. at A-15 (Gibson, J., dissenting); Moore III

651 S.W.2d at 581. Articulating a more accurate description of the role which subjective moral values play in its due process analysis, the Bouie Court wrote:

> [In the] last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in United States v. Wiltberger, 5 Wheat 76, 96, 5 L. Ed. 37-42 [(1820)]. . . . 'It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. . . .'

Bouie, 378 U.S. at 362-63.

One could debate at length the competing moral principles which underlie the "agency" vs. the "proximate cause" theories of the felony-murder doctrine. A state's criminal statutes, as interpreted by a state's courts, ultimately establish the legal moral standards which guide every citizen's life. Thus, the Missouri Supreme Court's adoption of the agency theory of felony-murder in Majors and Glenn represented the state law's "morality" until the Supreme Court adopted the new proximate cause theory in Moore II.

The State of Missouri has punished Moore for his attempted robbery offense. Moore was incarcerated for more than ten years. The Constitution prohibits a state from retroactively applying new sanctions on personal behavior. A state's retroactive application of a new or expanded interpretation of its criminal law represents a form of tyranny which the American constitutional system of justice has refused to countenance.

C. The Language of Missouri's Felony-Murder Statute And The Law Of Other States Did Not Give Respondent Fair Warning Of The Missouri Supreme Court's Reversal Of Its Former Interpretation Of Missouri's Felony-Murder Statute.

The ambiguous language of Missouri's felony-murder statute did not give respondent fair warning that the Missouri Supreme Court would reverse its former interpretation of the statute.

Moore was entitled to rely on the Missouri Supreme Court's opinion in Majors which adopted the agency theory of Missouri's felony-murder statute. The Eighth Circuit correctly observed that "in light of Majors, which narrowed the scope of the felony murder statute, we are not confronted with the statute 'as written' but rather as judicially construed." Moore IV, P.A. at A-8. One may analogize the Missouri Supreme Court's opinion in Majors with the trespass statute in Bouie. The Majors opinion and the Bouie statute both represented the state of the law until the supreme courts of Missouri and South Carolina expanded the judicial interpretation of those statutes.

In Rose v. Locke, 423 U.S. 48, 53 (1975) (per curiam), this Court found that the narrow judicial interpretation of an ambiguous state criminal statute gave the defendant adequate notice that the statute prohibited a specific type of sexual conduct. In the case at bar, one must determine Missouri's criminal law based upon the judicial interpretation of Missouri's felony-murder statute, not the language of the statute itself.

The Missouri Supreme Court's adoption of the proximate cause theory of felony-murder cannot be judged as foreseeable by reference to the law of other jurisdictions. Moore was subject to Missouri's criminal law and Missouri must be bound by its own law. See Bouie, 378 U.S. at 359-60 (meaning of statutes other states is not relevant to a determination of the South Carolina Supreme Court's express pronouncement of its criminal law).

IV. THE EIGHTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY SUPREME COURT OR CIRCUIT COURT OPINION, DOES NOT ESTABLISH ANY NEW PRECEDENT, AND, THEREFORE, DOES NOT MERIT THIS COURT'S REVIEW.

The Eighth Circuit's well-reasoned opinion rests primarily on Bouie and its progeny. No circuit court opinion conflicts

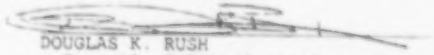
with Moore IV. This Court's repeated affirmations of Bouie reflect that the Eighth Circuit's opinion does not present any novel or important constitutional questions which would merit this Court's review. Indeed, petitioner has not even suggested that this Court reexamine Bouie.

Petitioner attempts to persuade this Court that the Eighth Circuit's opinion violates principles of federalism and impinges on the jurisdiction of the Missouri courts. But the Eighth Circuit opinion merely applied federal constitutional principles and did not decide any questions of state law. Moore IV represents one of many decisions which has applied the Bouie due process retroactivity test on a case-by-case basis. In short, Petitioner has not established a sound basis for this Court to use its limited and valuable judicial resources to review this case. See U.S. Sup. Ct. R. 17.

V. CONCLUSION

This court should deny the petition for writ of certiorari to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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APPENDIX A

TEXT OF 28 U.S.C. § 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

APPENDIX B

Text of State v. Moore, No. 38,783,
slip. op. (Mo. Ct. App. June 27, 1978)

IN THE MISSOURI COURT OF APPEALS

ST. LOUIS DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	Cause No. 38,783
	)	
Plaintiff-Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	Hon. P.F. Palumbo, Judge
BRIAN KEITH MOORE,	)	
	)	OPINION FILED
Defendant-Appellant.	)	
	)	June 27, 1978.

Defendant was convicted of first degree murder and attempted robbery in the first degree by means of a dangerous and deadly weapon. Defendant's appeal charges that the trial court erred: (1) in failing to discharge him on the ground that his arrest was without warrant or probable cause; (2) in failing to suppress certain evidence and identification testimony allegedly procured by illegal means; (3) in failing to instruct the jury on second degree murder and manslaughter. Our review of the pertinent law leads us to the conclusion that the first degree murder conviction must be reversed. But for the reason hereafter set forth, we transfer the case to the Supreme Court.

Defendant's conviction stems from a robbery attempt in the Emergency Room Lounge in St. Louis. On the evening of July 28, 1975, three young men entered the lounge and announced their intention to commit robbery. The defendant, later identified as one of the robbers, carried a shotgun, and one of his companions, Ross Hogan, displayed a pistol. The plans for an unmolested robbery went awry when a customer, Alfred "Rip"

Williams, drew a .38 caliber pistol from his trousers. Hogan fired at Williams and missed, but Williams, shooting twice, wounded Hogan. A shotgun blast felled Williams, who, while lying on the floor, saw the foot of a man standing over him. Fearing that he would be shot again, Williams fired at the foot, striking it. Retreating from their nefarious incursion, the robbers maintained an enfilade of gun fire, wounding Williams once more.

As the robbers fled the lounge, one was observed to be limping and another holding his side. They were seen discarding the shotgun and pistol from a speeding car as they left the scene of the aborted robbery attempt. The weapons were later recovered by police.

When the violence of the night had subsided, a customer, Lawrence Meadows, was found mortally wounded from a bullet in his brain. Ballistic tests proved that the lethal missile had been fired from the gun of Rip Williams in his ill-considered effort to frustrate the robbery. Two days after the incident, two detectives contacted an informant with whom they had never worked, but about whom they were familiar. The informant told the detectives that he had learned from a relative of the defendant that the perpetrators of the attempted robbery were Ross Hogan, a man named Carl, and the defendant. The police were aware of Hogan's involvement, as he had been arrested and was hospitalized for treatment of shotgun wounds. The informant advised the police that the defendant had been shot in the right foot and was on crutches; that he could be found in either the 4100 block of Ashland Avenue or the 4300 block of Labadie. The same day they received the information, the two detectives saw defendant in the 4100 block of Ashland with a

bandaged right foot and walking with the aid of crutches. When approached, the defendant was nervous, gave the alias of Joseph Madison and stated that he was 17 years old. He possessed no identification. He attributed his injury to stepping on a rusty nail. The police removed his shoe and noticed two wounds, one on each side of his ankle. Defendant was arrested and taken to a hospital for treatment. His shoe, which was confiscated for evidence, was punctured in the places corresponding to his wounds in the ankle.

A physician at the hospital confirmed that defendant's ankle injury was a gun wound. Defendant then gave his correct name and admitted his participation in the robbery but denied any shooting. When police learned from his mother that the defendant was only 16 years old he was immediately taken to the Juvenile Detention Center. Defendant was subsequently placed in a line-up and identified by two witnesses as one of the robbers.

Defendant initially argues that the trial court erred in failing to "discharge" him by reason of the State's failure to establish probable cause for his warrantless arrest. This point is without merit.

"Probable cause" exists where the facts and circumstances within the officers' knowledge and of which thoe have reliable and trustworthy information would warrant a man of reasonable caution to believe that the person being arrested had committed the offense for which he has been placed in custody. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 92 L.Ed. 1879 (1949); Carroll v. United States, 267 U.S. 132, U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (t925); State v. Wiley, 522 S.W.2d 281 (Mo. banc 1975).

Defendant argues that there was no reasonable ground extant for his warrantless arrest, particularly since the arresting officers had not personally known the informant nor had personal experience with him. We disagree with defendant's contentions. As stated in State v. Wiley, supra at 288:

> There is no absolute requirement that the informant be one of previous reliability. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971).
>
> The true inquiry therefore is whether the informant's present information is reliable. As long as the corroboration of the information through other sources, even though the matters are innocuous, reduces the changes of a "reckless or prevaricating tale," the information, even though hearsay, may form the basis of probable cause for an arrest.

Under the circumstances of this case, we have no doubt that probable cause existed for defendant's arrest. The arresting officers had been assigned the specific task of investigating the crime which had occurred two days earlier involving three youths, one of whom had been shot in the foot and had been observed limping from the crime scene. Another of the robbers was already in police custody. The informant had dealt with police previously, albeit not the particular arresting officers, tut they were aware of his past contributions. The informant, attributing his information to a relative of the defendant, advised the police that the defendant had been shot in the right foot, was on crutches and could be found in the 4100 block of Ashland. And exactly as told, the police found defendant, complete with crutches and bandaged right foot, in the 4100 block of Ashland. He gave an implausible explanation for his injury and fit the general description of one of the robbers. The information accurately detailed by the informant was fully corroborated by the personal observation of the arresting officers. The accusation of defendant is thus

readily distinguished from the rumor or vague circumstances decried in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), upon which defendant relies. The arrest was lawful. State v. Grady, 548 S.W.2d 601 (Mo.App. 1977); State v. Kent, 535 S.W.2d 545 (Mo.App. 1976); State v. Wiley, supra.[1]

Defendant's second contention is that certain evidence defendant's shoe with the bullet punctures--and identification testimony should have been suppressed as having been obtained as the result of an illegal arrest. We have already ruled that probable cause existed for defendant's arrest and that it was lawful. Hence, the seizure of the evidence and its use at trial was lawful. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed. 2d 771 (1974); State v. Webb, 560 S.W.2d 318 (Mo.App. 1977); State v. Williams, 554 S.W.2d 524 (Mo.App. 1977); State v. Gordon, 527 S.W.2d 6 (Mo.App. 1975). This is particularly true where the items seized--in this case, defendant's shoe with apparent bullet holes--was in plain view of the arresting officers. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968); State v. Hall, 534 S.W.2d 508 (Mo.App. 1976); State v. Achter, 512 S.W.2d 894 (Mo.App. 1974).

Defendant also asserts State v. Wade, 531 S.W.2d 726 (Mo. banc 1976), as a purported barrier to the use by the State of his shoe and identification testimony linking him to the crime. Wade holds that it is reversible error to

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[1]Of course, an alleged illegal arrest forms no ground for relief on collateral attack once a defendant is convicted, nor does it affect the trial court's jurisdiction to try the case. State v. French, 528 S.W.2d 170 (Mo.App. 1975). So there is no materiality here to the issue of legal arrest.

admit testimony regarding a confession of a juvenile offender made prior to being taken to the juvenile authorities. Wade is not apt here, as the State absolutely refrained from introducing or using defendant's inculpatory statements. The shoe, as discussed, was admissible as being in plain view and having been taken as a result of a lawful arrest.

Defendant cites State v. Ross, 516 S.W.2d 311 (Mo.App. 1974), and argues that the shoe should have been excluded as having been obtained as a result of his inadmissible confession. Ross is readily distinguishable, because the taking of the shoe bore no relationship to defendant's confession which was excluded. The shoe with the bullet holes was suspicious on its face and in plain view, whereas in Ross, police were led to evidence only by reason of the juvenile's confession. Here, we have ruled the shoe admissible, seized pursuant to a lawful arrest. It was not obtained by reason of anything said or illegally gained.

The in-court identification testimony, challenged by defendant, was admissible as it was sustained by ample independent sources. State v. Radford, 559 S.W.2d 751 (Mo.App. 1977).

Defendant's final point is that the trial court erred in failing to give murder second degree and the manslaughter instructions. This precise contention was raised and rejected in the appeal from the conviction of Ross Hogan, defendant's partner in the Emergency Room Lounge robbery, where the court said:

> "His [Ross Hogan's] first contention is that the trial court should have instructed on Count I on second degree murder and manslaughter. In a felony-murder case such instructions are to be given only 'where there is evidence warranting a finding that the murder was not committed in the perpetration or an attempt to commit the felony

> relied upon to authorize a felony murder instruction.' MAI-CR 6.02 caveat a.; State v. Tyler 556 S.W.2d 473 (Mo.App. 1977). The killing of Meadows was solely the product of the attempted robbery and the predictable, although ill-considered, attempt of Williams to thwart it. There is no evidence to support the giving of instructions on lesser offenses of homocide. Defendant was either guilty of felony-murder or he was guilty of nothing." State v. Hogan, ___ S.W.2d ___, No. 38533 (Mo.App.St.L., May 2, 1978).

Defendant contends that the evidence was not clear to establish that he had exhibited the requisite element of deliberation to establish first degree murder. This argument ignores the basic purpose of the felony-murder doctrine: to permit the felonious intent required for a murder conviction to be shown by the perpetration or attempt to perpetrate a felony. State v. Chambers, 524 S.W.2d 826 (Mo. banc 1975). Inquiry into the actual intent of the perpetrator is irrelevant. If a homocide is committed during the actual or attempted perpetration of one of the felonies enumerated in §559.010 RSMo. 1969 (repealed by Laws 1975, p. 408, H.B. No. 150, §2),[2] proof of the commission or attempt to commit that felony authorizes a finding of first degree murder. State v. lindsey, 507 S.W.2d 1 (Mo. banc 1975); State v. Ford, 495 S.W.2d 408 (Mo. banc 1973). Homocide committed in connection with felonies other than those enumerated is murder in the second degree, absent a finding of the elements of the first degree. State v. Jasper, 486 S.W.2d 268 (Mo. banc 1972). Consequently, the allegation that defendant attempted robbery in the first degree, a felony enumerated in § 559.010 RSMo.

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[2]Section 559.010 RSMo. 1969, as repealed by Laws 1975, subsequently evolved into §559.007 RSMo. Supp. 1975, which has been repealed by Laws 1977, P. ___, H.B. No. 90, §2, effective May 26, 1977 as §565.003 RSMo. Supp. 1977.

Defendant was tried under §559.010, as the date of the crime was July 28, 1975.

1969, justifies the submission of the instructions for murder in the first degree. If the jury failed to find the defendant guilty of attempted robbery, he could not be found guilty of murder in any degree. State v. Ford, supra. Thus, defendant was not entitled to have instruction on a lesser degree of murder. Jackson v. State, 558 S.W.2d 816 (Mo.App. 1977).

Defendant asserts that the felony-murder doctrine cannot apply, "in that a bullet from Defendant's gun did not take the victim's life, and in order to be guilty of a homicide, the act of a homicide must be done by the Defendant." Defendant's assertion is inaccurate. Under the felony-murder doctrine, there need be no proof that defendant fired the fatal shot. Participation in a felony--in this case--attempted robbery--is sufficient to support conviction for murder. State v. Ford, supra; Dickson v. State, 449 S.W.2d 576 (Mo. 1970); State v. Francis, 544 S.W.2d 306 (Mo.App. 1976).

But the question in this case is whether defendant can be held liable for a killing by one with whom he is not acting in concert. The only Missouri case dealing directly with this issue is State v. Majors, 237 S.W. 486 (Mo. 1922), which holds that a defendant may not be held guilty for a death in such circumstances. The facts in Majors are remarkably similar to those in the instant case. Majors and two companions participated in the hold up of a gambling house in Kansas City. The robbery attempt was interrupted when one of the gambling house guests, Richard Wade, opened fire on the robbers. A gun battle ensued and one of Wade's bullets went astray, striking and killing another guest, Frank Gardner. Majors was charged with Gardner's murder. In Majors, the

defendant offered the following two instructions which were refused by the trial court:

> (B) The court instructs the jury that if you find and believe from the evidence that the shot that killed Frank Gardner was not fired by the defendant, or by some one with whom he was acting in concert, if any, then you must find the defendant not guilty.
>
> (C) The court instructs the jury that if you find and believe from the evidence in this case that Frank Gardner was killed by a shot fired from a revolver by one Richard Wade, or if you are unable to determine from the evidence beyond a reasonable doubt that said shot was not fired by said Richard Wade, then you must find the defendant not guilty, unless you further find and believe from the evidence beyond a reasonable doubt that the defendant acted in concert with the said Wade to do an unlawful act, and that the death of said Frank Gardner happened and was occasioned by the doing or attempting to do such unlawful act.

In reversing Major's conviction and referring to the first of the goregoing instructions, the Supreme Court stated, l.c. 488:

> "This instruction was the converse of instruction given for the state, and told the jury that if it found and believed from the evidence that the shot that killed the deceased was not fired by the defendant or by some one who was acting in concert with him, then he should be acquitted. This was a correct declaration of law, and such an instruction was warranted upon the evidence adduced by the state." (emphasis added)

The court also held that the second of Majors' offered instructions should have been given as involving the same principle of law. Therefore, under the holding of Majors and under the facts of this case, defendant could not be found guilty of the felony murder of the victim as he was not acting in concert with Rip Williams, who actually fired the fatal shot.

There has been no further pronouncement by the Supreme Court on the precise issue before us since the 1922 Majors case, and we believe that its holding should be reexamined. At the time the victim was killed by Rip Williams' bullet,

defendant was engaged in criminal activity amounting to a felony. Defendant, in perpetrating an attempted robbery, initiated the chain of events which led to the victim's death at the hand of Rip Williams. The death was well within the res gestae of the initial issue, and the causal connection between the death and the robbery attempt would justify holding defendant criminally responsible. State v. Hogan, supra.[3] See State v. Adams, 339 No. 926, 98 S.W.2d 632 (1936); State v. Mullen, 532 S.W.2d 794 (Mo.App. 1975); State v. McClain, 531 S.W.2d 40 (Mo.App. 1975). It would appear reasonable to find that defendant's felonious activity triggered the felony-murder doctrine, and he should tear the forseeable consequences flowing from his unlawful conduct. Reference is made to 56 A.L.R. 3d 239 (1974) for a thorough study and collection of cases dealing with the application of the felony-murder doctrine to a person engaged in a felonious act for a homicide committed by another resisting the act.

Recently, in State v. Phillips, ___ S.W.2d ____, No. 37403 (Mo. St.L., May 23, 1978), this court upheld the application of the felony-murder doctrine to a defendant in the situation where defendant and another person were engaged in a shoot-out between each other with an innocent bystander being killed and with the State being unable to determine which of the participants had fired the fatal shot. In Phillips, the felony-murder doctrine applied because the defendant was engaged in felonious conduct at the time of the killing irrespective of the fact that he might not have shot at the innocent bystander. It would logically follow that the felony-murder doctrine would apply here, for, after all,

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[3]The applicability of the felony-murder rule in the situation where a party not acting in concert with a defendant fires the shot killing an innocent bystander was not raised in State v. Hogan, supra.

defendant was in the process of attempting an armed robbery, and Rip Williams' effort to thwart the robbery--although unwise--was reasonably forseeable.

Therefore, while we would be obliged to reverse defendant's conviction for first degree murder by reason of State v. Majors, supra, we certify this case to the Supreme Court for reconsideration of the felony-murder doctrine as it would apply to a person who perpetrates a felony where another is killed by someone resisting the felony.

Of course, defendant's conviction for an attempted first degree robbery should be affirmed.

/s/ GEORGE F. GUNN, JR.,
PRESIDING JUDGE

/s/ Harry L. C. Weier Judge Concurs

/s/ John J. Kelly Judge Concurs